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SPECIAL REPORT

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The Senate Republican "HMO Protection Act" Fails Patients

A Comparison of the Senate-passed Bill to S. 6, the Democratic *Patients' Bill of Rights*

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A Comparison of the Senate-passed Bill to S. 6, the Democratic *Patients' Bill of Rights*

On July 15, 1999, the Senate adopted, by a 53-47 vote, a Republican version of "patient protection" legislation (**S. 1344**). Senators Chafee and Fitzgerald joined all Democrats in voting against the bill. The Republican bill passed by the Senate excludes 113 million Americans from most of its protections. In addition, the bill omits key Democratic protections, such as ensuring that doctors, not insurers, make medical decisions, and the right to hold HMOs accountable when their decisions kill or injure a patient.

Where the two bills have provisions addressing similar abuses, the Republican proposals are all weaker than the comparable Democratic provisions. In most cases, the provisions in the Republican bill are little more than sham protections—too riddled with loopholes to actually help patients. The Republican proposal provides a series of hollow, cosmetic measures that will leave insurers and HMOs in charge of medical decisions. Republicans repeatedly rejected the real protections in the Democratic bill that would provide access to emergency care, an independent appeals process, access to medical specialists, prescription drugs, clinical trials, and protect the doctor-patient relationship.

S. 6, the Democratic *Patients' Bill of Rights*, is supported by more than 200 groups representing doctors, nurses, and patients, as well as other health providers and advocates for persons with disabilities, children, women and families. The Republican bill is supported by no one but the insurance companies and their allies.

In addition, the Republican proposal includes a series of new tax breaks that have little or nothing to do with patient protections. It also repeals a Medicare HMO competitive pricing demonstration project opposed by the insurance industry. One large new giveaway for the wealthy was secretly inserted in the final bill without any debate or discussion.

Comparison of Republican and Democratic Provisions

Who is Covered

✘ **Republican bill.** The Republican bill leaves more than 100 million Americans uncovered because most substantive protections in the bill apply only to individuals enrolled in private, employment-based "self-funded" plans. A self-funded plan is one in which the employer pays medical bills directly rather than buying coverage from an HMO or an insurance company (although an insurance company usually administers the program).

A recent study in *Health Affairs* found that only two percent of employers offer HMOs that would be covered by the standards in the Republican bill and only nine percent of all employees are in such HMOs.

Self-funded coverage typically is offered only by large companies. Of the 161 million privately insured Americans, only 48 million are enrolled in such plans. And of those 48 million, only a small number—at most ten percent—are in HMOs (Employee Benefit Research Institute).

All State and local government employees, and people who buy health insurance as individuals (e.g., farmers, small businessmen, the self-employed) are excluded from the Republican bill, as are 75 million workers whose employers buy coverage through an insurance company or HMO. Ironically, almost everyone enrolled in an HMO is exempt from the Republican plan, since HMOs are almost never offered through self-funded arrangements.

✔ **Democratic bill.** All 161 million privately insured Americans are covered by the Democratic bill.

Emergency Care

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Unclear whether it ensures coverage under a "prudent layperson" standard, despite Republican promises to correct ambiguous language.
- ✘ Provides no guarantee individuals cannot be financially penalized if they go outside the HMO network, despite Republican promises to correct ambiguous language.
- ✘ Includes a new section on access to post-stabilization care that contains big loopholes:

  (1) If the plan does not respond to an emergency department in one hour, they have to pay for services to maintain stability—but those services are defined as services in the emergency department. Therefore, if a patient is transferred to another part of the hospital for post-stabilization care, the Republican bill would not require coverage for that care. There is no provision to require plans to allow a patient to be admitted to the out-of-network hospital.

  (2) HMOs *could* write in their contract that they do not cover hospitalizations following stabilization, even within the HMO's network.

- ✘ Does not grant a right to appeal denials of care based on the prudent layperson standard.

Democratic bill

- ✔ **C**overs all privately insured Americans (161 million).
- ✔ Allows an individual who has symptoms that meet the prudent layperson standard to go to the nearest emergency room without preauthorization, and requires the insurance plan to cover the visit. The plan may not impose additional charges for use of a non-network facility.
- ✔ Requires payment for maintenance and post-stabilization care according to rules already adopted for Medicare, which provide for coordination of care between the HMO and the admitting hospital. These rules also protect beneficiaries against delays in needed treatment or additional charges if the HMO fails to respond to requests to authorize treatment in a timely way.
- ✔ Permits denial by HMO to be appealed to independent third-party reviewer.

OB/GYN

Republican bill

- ✘ **C**overs only women in self-insured plans (less than 48 million).
- ✘ Does not allow designation of Obstetrician/Gynecologist (OB/GYN) as primary care physician.
- ✘ Does not require plan to allow direct access to OB/GYN, *except* for routine care. If a woman has an abnormal pap smear, she has to go through a gatekeeper to seek further treatment.
- ✘ Opposed by the National Partnership for Women and Families and the American College of Obstetricians and Gynecologists (ACOG).
- ✘ Does not permit patient to appeal denial of direct access to an OB/GYN.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Allows patients to designate OB/GYN as primary care physician.
- ✔ Provides direct access to OB/GYN for *all* OB/GYN services.
- ✔ Permits denial of access to an OB/GYN to be appealed to an independent third-party reviewer.

Specialty Care

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Provides no ability to go outside HMO network at no extra cost if HMO's network is inadequate.
- ✘ Allows HMO to write contracts rendering the protection meaningless (e.g., specialty care is covered under the contract only when authorized by a gatekeeper). Essentially, this provision is a restatement of the status quo.
- ✘ Does not ensure that people with chronic conditions can use their specialist to coordinate their care.
- ✘ Gives no right to appeal an HMO decision to deny care by an appropriate specialist.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Provides the right to specialty care if specialty care is medically indicated.
- ✔ Ensures no extra charge for use of non-network specialist if the HMO has no specialist in its network appropriate and available to treat the condition.
- ✔ Ensures that a specialist may act as care coordinator for patients with chronic, ongoing conditions.
- ✔ Permits decision to deny specialty care to be appealed to independent reviewer.

Requirement for Plans to Pay Routine Doctor and Hospital Costs of Clinical Trials

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Covers only NIH-sponsored cancer clinical trials—leaves out patients with mental illness, spinal cord injury, Parkinson's disease, Alzheimer's disease, diabetes and other serious conditions (only 1/3 of clinical trials are for cancer). Overall, only 10 percent of patients eligible to enroll in clinical trials would receive any coverage.
- ✘ Does not provide a right to appeal an HMO's denial of coverage for a needed clinical trial.
- ✘ No cancer groups supported the amendment when it was offered; the American Cancer Society, National Breast Cancer Coalition, National Alliance for Mentally Ill, and many other groups opposed it.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Covers all quality clinical trials.
- ✔ Ensures a denial of a needed clinical trial can be appealed.
- ✔ Supported by all major cancer and disease groups.

Access to Needed Drugs not Included in Plan List (Formulary)

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Allows HMOs to financially penalize the few people covered under the bill who need to obtain medicine off an HMO's approved list (formulary) when their doctor says it's medically indicated.
- ✘ Allows HMOs to deny drugs on the basis that they are experimental, even though the FDA has approved them.
- ✘ Permits no appeal for denial of access to non-formulary drugs.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Prohibits HMOs from charging more for medically necessary off-formulary medications.
- ✔ Prohibits HMOs from denying coverage of FDA-approved drugs by classifying them as experimental.
- ✔ Permits denials of access to non-formulary medications to be appealed to independent entity.

Point-of-Service Option

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Grants additional specific exclusion for small businesses, which leaves out the patients who are most in need of a point-of-service option (because their employers are least likely to offer a choice of plans).

Democratic bill

- ✔ **C**overs all privately insured Americans, including those in small businesses.

Continuity of Care for Patients

(when a doctor is dropped from a network or an employer changes insurance plans)

Republican bill

- ✘ **C**overs only individuals in self-insured plans (48 million).
- ✘ Leaves out protection for all Americans who are not terminally ill, pregnant, or hospitalized (e.g., patients with cancer, chronic illnesses, or any other disease who are undergoing a course of treatment).
- ✘ Provides only 90 days of continued care to terminally ill and hospitalized patients, forcing them to change doctors or hospitals, even if they live longer or have not been discharged from the facility.
- ✘ Does not allow patients to appeal an HMO's refusal to keep their doctor for a transitional period.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Provides a transition period of 90 days for all patients who are undergoing treatment when change occurs (e.g., patients having chemotherapy or radiation therapy, cardiac rehabilitation following open heart surgery, psychiatric care, diabetes management, etc.).
- ✔ Allows terminally ill patients to stay with the same doctor through the end of their lives; hospitalized patients can stay in the same hospital until discharge or hospitalization is no longer medically necessary.
- ✔ Permits denial of transitional care to be appealed to an independent entity.

Medical Necessity

Republican bill

- ✘ **A**llows HMO to define "medical necessity". No matter how narrow or unfair to patients the HMO's definition is, their definition controls in any coverage decision, including decisions by the "independent" third party reviewer.
- ✘ Allows restrictive contract language to stand, and tie the hands of independent reviewers, such as one in Missouri that gives the company "sole discretion to determine whether care is medically necessary. The fact that care has been recommended, provided, prescribed or approved by a physician or other provider will not establish that the care is medically necessary."

Democratic bill

- ✔ **P**revents HMOs from arbitrarily interfering with doctors' decisions. Codifies traditional definition used by most insurers, "medically necessary or appropriate means a service or benefit consistent with generally accepted principles of professional medical practice." This definition is based on case law and standards historically used by insurance companies. It is reasonable for both the plan and the patient because it is based on evidence in the particular case and general clinical standards.

External Appeals

Republican bill

- ✘ **L**eaves out 38 million Americans, those in the individual market and those receiving coverage from State and local governments.
- ✘ Jeopardizes protections for millions of Americans in States that have stronger external review laws.
- ✘ Allows the HMO to choose and pay the appeal entity that decides the case.
- ✘ Allows the HMO or insurer to define medical necessity, tying the hands of the independent review entity and forcing them to defer to the HMO's definition.
- ✘ Fails to provide for *de novo* review—a fresh look at the facts—placing a heavy burden of proof on the patient to overturn an HMO's decision.
- ✘ Fails to ensure a binding decision: the decision of a reviewer is binding "only if provisions … were complied with by the independent external reviewer." Allows HMOs to challenge a reviewer's decision in court.
- ✘ Does not provide an appeal when most rights under the bill are denied. For example, when emergency care is denied or access to a specialist is denied, no appeal is allowed. The only situations in which an appeal is allowed are: when the plan has made the decision to deny care based on medical necessity (which the plan defines itself); and when the plan has defined a treatment as experimental and, on that basis, denied the treatment. Disputes over coverage under the plan—apart from decisions based on medical necessity or experimental care—are not appealable.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Ensures a State or Federal agency controls the process for choosing the appeal entity—not the insurer.
- ✔ Ensures a de novo review—a fresh look at the facts.
- ✔ Ensures a reviewer's decision is based on a statutory definition of medical necessity (not the plan's definition) and review of best available medical evidence.
- ✔ Ensures the decision of independent reviewer is binding.
- ✔ Permits all denials of care to be appealed.

Ability to Hold HMOs Accountable

Republican bill

- ✘ **M**aintains existing Federal law protections for HMOs and insurers that injure or kill patients when they delay or deny care. Current Federal law (ERISA) preempts State remedies. The only remedy under ERISA is recovery of the cost of the denied benefit. For example, if a patient is denied a mammogram and dies of breast cancer as a result, the only remedy available to the family is the recovery of the cost of the mammogram.

Democratic bill

- ✔ **W**aives ERISA preemption of State remedies only when the actions of an HMO have killed or injured a patient. Employers may not be sued unless they, rather than the insurance company or HMO, made the decision to deny care that led to the injury or death.

Protection of the Doctor-Patient Relationship

Republican bill

- ✘ **A**pplies only to those in self-insured plans (48 million).
- ✘ Prohibits plans from forbidding doctors to discuss treatment options with patients.
- ✘ Does not ensure doctors can talk about the HMO's financial incentives or its processes for determining whether it will approve care.
- ✘ Does not include additional measures needed to make a prohibition on gag clauses meaningful, since HMOs can continue to: (1) fire doctors without giving any reason; (2) establish financial incentives that penalize a doctor for prescribing expensive care or making referrals to needed specialists; and (3) penalize doctors and other health professionals who advocate for patients in the appeals process or report quality problems.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Prohibits plans from interfering with doctor-patient communications in any way.
- ✔ Limits HMOs' financial incentive arrangements that penalize doctors for providing quality care (incorporates Medicare rules).
- ✔ Requires plans who discharge doctors to give a reason for the dismissal and an opportunity to appeal.
- ✔ Prohibits plans from punishing health professionals who advocate for patients in appeal process or report quality problems.

Information

Republican bill

- ✘ **E**xcludes 38 million people with individual insurance policies or coverage from a State or local government plan.
- ✘ Does not require plans to tell patients when their benefits change.
- ✘ Does not require plans to tell patients up front the specific benefits excluded from coverage.
- ✘ Does not require any information on the quality of the plan, such as patient satisfaction, immunization rates, etc.

Democratic bill

- ✔ **C**overs all privately insured Americans.
- ✔ Requires consumer information up front on quality and specific benefit exclusions, and requires timely notification when benefits change.

New Tax Breaks and Miscellaneous Provisions

The Republican bill includes a number of new tax breaks having nothing to do with patient protection, and repeals a Medicare HMO demonstration.

Roth IRAs

- ✘ **P**rovides a multi-billion dollar tax break for the wealthiest taxpayers in the country that has nothing to do with patients' rights.
- ✘ Purports to pay for the GOP bill, but instead drains the Treasury over time.
- ✘ Raises income limit on rollovers into Roth IRAs from $100,000 to *one million dollars*.
- ✘ Guarantees that earnings on these rollovers will be completely tax-free.

Medical Savings Accounts (MSAs)

- ✘ **C**onverts a pilot program in the private market and Medicare into a full-scale program that benefits the healthy and wealthy and threatens to make insurance more expensive for those who maintain traditional, comprehensive insurance.
- ✘ Creates a tax shelter for the wealthy while doing little to expand access to insurance.
- ✘ Creates MSAs for the Federal Employees Health Benefits Program, costing the Federal Government millions and potentially undermining the stability of an otherwise healthy risk pool for Federal employees.
- ✘ Essentially repeals State benefit laws for catastrophic insurance policies that accompany MSAs by preventing application of State law. Current State benefit laws regarding catastrophic insurance primarily require coverage of preventive services, such as well-child care.

Medicare

✘ **E**nds an industry-opposed competitive pricing demonstration program currently being established for Medicare HMOs in Kansas City (MO and KS) and Arizona, and prevents the Secretary from establishing a test in any market before 2001.

Conclusion

Senate Republicans rejected **S. 6**, a real *Patients' Bill of Rights*. The Republican leadership still leaves medical decisions in the hands of insurance company accountants and provides no effective mechanism to hold plans accountable when plan decisions kill or injure patients. More than two thirds of privately insured Americans—over 100 million people—are not covered by the Republican plan. The Republican bill is a series of hollow promises that fail to provide meaningful protections to patients.